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ELECTRONIC ARTS INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAMUEL MICHAEL KELLER, on behalf of himself and all others similarly situated,

Plaintiff,

v.

ELECTRONIC ARTS INC.; NATIONAL COLLEGIATE ATHLETICS ASSOCIATION; COLLEGIATE LICENSING COMPANY,

Defendants.

Case No. CV-09-1967-CW

ELECTRONIC ARTS INC.'S NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: September 24, 2009
Time: 2:00 p.m.
Dept: Courtroom 2, 4th Floor
Judge: Hon. Claudia Wilken

Date Comp. Filed: May 5, 2009

NOTICE OF MOTION AND STATEMENT OF RELIEF SOUGHT

PLEASE TAKE NOTICE that on September 24, 2009 at 2:00 p.m. before the Honorable Claudia Wilken, United States District Court, 1301 Clay Street, Suite 400 S, Oakland, California 94612-5212, Courtroom 2, 4th Floor, defendant Electronic Arts Inc. ("EA") will, and hereby does, move the Court for an order dismissing the second, third, fourth, fifth, and seventh causes of action in the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

EA moves to dismiss all of Plaintiffs' causes of actions asserted against EA on the following grounds: (1) assuming EA uses Plaintiff's protectable attributes, the use would be protected by the First Amendment and California Constitution because EA's games are expressive and transformative works; (2) assuming EA uses Plaintiff's protectable attributes, the use would be protected by the First Amendment and California Constitution because of the public's strong interest in information about sports and athletes; and (3) Plaintiff has not alleged a recoverable injury.

Additionally, EA moves to dismiss: (1) the second cause of action on the grounds that if EA uses Plaintiff's protectable attributes, the use would be exempt from liability under section 3344(d)'s "public affairs" exemption; (2) the fourth cause of action on the grounds that Plaintiff lacks an underlying tort upon which to base the conspiracy claim; (3) the fifth cause of action on the grounds that Plaintiff lacks an underlying tort claim upon which to base the unfair competition claim; (4) the seventh cause of action on the grounds that no claim for unjust enrichment exists under California law absent independent grounds—not alleged by Plaintiff—for imposing an implied contract or constructive trust and, even if the court recognizes a claim for unjust enrichment under California law, there exists a valid express contract covering the subject matter at issue.

For each of these reasons, EA respectfully requests that the Court grant this Motion and dismiss Plaintiff's causes of action against EA with prejudice.

This Motion is based on this Notice; on the attached Memorandum of Points and Authorities; on the concurrently-filed Request for Judicial Notice and Declarations of Jeremy Strauser and Sean O'Brien with Exhibits A through H; on the concurrently lodged editions of

NCAA Football 06 through *NCAA Football 09*, *NCAA March Madness 06* through *NCAA March Madness 08*, *NCAA Basketball 09*, PlayStation 2 console, and two controllers; all pleadings, files, and records in this action; and on such other argument as may be received by this Court at the hearing on this Motion.

Dated: July 29, 2008

KEKER & VAN NEST LLP

By: */s/ Robert A. Van Nest*
ROBERT A. VAN NEST
Attorneys for Defendant
ELECTRONIC ARTS INC.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

"Video games are expressive works entitled to as much First Amendment protection as the most profound literature." *Kirby v. Sega of America*, 144 Cal. App. 4th 47, 58 (2006). Recognizing that publicity rights claims have the potential to stifle free expression, courts regularly dismiss misappropriation claims that infringe upon this constitutional protection. That is the case here. Because Plaintiff Sam Keller's claims would impermissibly intrude upon Electronic Arts Inc.'s ("EA") First Amendment right to create, develop, and publish video games, they must be dismissed.

Plaintiff, a former college football player, alleges—on behalf of himself and a purported class of college football and basketball players—that EA improperly used college athletes' likenesses in EA's *NCAA Football* and *NCAA Basketball / NCAA March Madness* video games.[1] But even assuming these games include some protectable attribute of Plaintiff, under two distinct lines of authority, the alleged use of such information is protected by the First Amendment and the California Constitution.

First, an expressive work that incorporates an individual's likeness is constitutionally protected against a right of publicity claim if the use is "transformative." *Winter v. DC Comics*, 30 Cal. 4th 881, 888 (2003). The relevant inquiry is "whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized," in which case it is protected, "or whether the depiction … of the celebrity is the very sum and substance of the work in question." *Id.* A review of Plaintiff's complaint and the accompanying editions of *NCAA Football* and *NCAA Basketball / NCAA March Madness* demonstrate that the games are much more than a "mere celebrity likeness[]." As such, the games are transformative and protected by the First Amendment.

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[1] Plaintiff alleges seven causes of action: (1) Indiana statutory right of publicity against NCAA; (2) California statutory right of publicity claim against EA; (3) California common law right of publicity against EA; (4) civil conspiracy against all defendants; (5) California Business & Profession Code section 17200 against EA; (6) breach of contract against NCAA; and (7) unjust enrichment against EA and CLC. EA moves to dismiss all the claims asserted against it and understands that NCAA and CLC are moving to dismiss the claims asserted against them.

Second, and separately, courts repeatedly have held that the public's particular interest in information about sports and athletes "far outweighs" the athletes' rights of publicity. *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 415 (2001). Information such as athletes' names, likenesses, performance statistics, and biographical information—just the type of information Plaintiff claims EA isn't allowed to incorporate in its works—"command[s] a substantial public interest" and therefore "is a form of expression due substantial constitutional protection." *Id.* This is true even where such information is used in works such as sports websites and fan-driven "fantasy" baseball games, which are far less expressive and transformative than the video games at issue here. *See id.*; *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007).

Aside from the paramount First Amendment issues at stake, Plaintiff's complaint must be dismissed for the further separate and independent reason that it fails to allege any facts demonstrating that he was injured, a necessary element of each claim. The Supreme Court has recently affirmed that a plaintiff may not rely on conclusory allegations or bare recitations of the elements of his claims. *See Ashcroft v. Iqbal*, 556 U.S. ---, 129 S.Ct. 1937, 1949-50 (2009). Because Plaintiff alleges nothing more than empty conclusions regarding injury, all of his claims fail and should be dismissed.

Plaintiff's individual causes of action fail for numerous additional reasons. Plaintiff's second cause of action alleging violation of the California statutory right of publicity is barred by the statute's "public affairs" exception. Courts have held that sports and information about athletes fall within the "public affairs" category, thereby barring statutory right-of-publicity claims involving such matters. Plaintiff's allegations regarding the popularity of college sports and EA's games demonstrate that his claims are barred by this defense. *See* Compl. ¶¶ 4-6. Plaintiff's fourth cause of action for civil conspiracy claim fails because there is no underlying tort on which to base it, and because it is not supported by any factual allegations at all, but mere legal conclusions "on information and belief." Plaintiff's fifth cause of action for unfair competition is entirely derivative and thus fails for the same reasons as his other claims. Plaintiff's seventh cause of action for unjust enrichment is not recognized under California law

and is barred by the existence of a contract covering the same subject matter.

For all these reasons, and others explained in more detail below, the Court should dismiss all of the claims asserted against EA in the complaint, with prejudice.

II. BACKGROUND[2]

EA is a leading developer and publisher of computer and video games, including the *NCAA Football* franchise and the *NCAA Basketball / NCAA March Madness* franchise. Each annual edition of *NCAA Football* is released no later than July of the previous year; for example, *NCAA Football 06* was released in July 2005, and *NCAA Football 09* was released in July 2008. Electronic Art Inc.'s Request for Judicial Notice ("RJN") ¶ 4. Likewise, each annual edition of *NCAA Basketball* (formerly titled *NCAA March Madness* until a switch in the game's name in 2008) is released no later than December of the previous year (with the exception of *NCAA March Madness 07*, released in January 2007); again, for example, *NCAA March Madness 06* was released in October 2005, and *NCAA Basketball 09* was released in November 2008. *Id.*

These two game franchises simulate the excitement and challenge of college football and college basketball by combining advanced computer and software engineering with artistic expression. As a review of the games demonstrates, the virtual world of the games is comprised of originally designed locations, players, coaches, fans and other game elements. *Id.* ¶¶ 1-3. Players manipulate these elements through game controls, allowing a fully interactive, real-time college sports experience, complete with television-quality images and realistic sounds. *Id.* Players can match more than a hundred teams against each other, control team strategy decisions and individual athletes' movements, and tinker with such subtle details as the weather and crowd noise. *Id.* The interactive environment also allows players to control teams for entire seasons or manage the college program over a series of years, including "recruiting" in-game players from high school and monitoring their academic performance off the field or court. *Id.*

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[2] For the purposes of this motion only, EA accepts as true the Complaint's factual allegations, except that EA does not accept the truth of legal conclusions or allegations that are belied by information of which this Court may take judicial notice. *See In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 751-52 (N.D. Cal. 1997); EA's Request for Judicial Notice ("RJN") filed herewith.

As a review of the games demonstrates, these games are constructed from an array of graphics, sounds and information. A collection of characteristics such as height, weight, agility and strength is assigned to a virtual player, represented in the game by an original graphic created by EA. *Id.* These characteristics are displayed visually on certain games screens, but also used by the game as parameters for that virtual player's performance. *Id.* The virtual player is assigned to a team, clothed in a jersey and given a number—game elements all properly licensed from the NCAA and its licensing arm, the Collegiate Licensing Company ("CLC"). Compl. ¶ 11 ("pursuant to a license with the CLC, the NCAA's licensing company, Electronic Arts replicates team logos, uniforms, mascots, and even member school stadiums with almost photographic realism"). Game players can customize virtual players and teams based on their own preferences or accept the game's default settings. RJN ¶¶ 1-3. EA's games allow competition against opponents controlled by the game itself, a person connected to the same system, or a person connected over the Internet. *Id.*

On May 5, 2009, Plaintiff Samuel Keller commenced this action in which he alleges that EA, the NCAA and the CLC improperly use the "likenesses" of college athletes in the *NCAA Football* and *NCAA Basketball / NCAA March Madness* games. Compl. ¶ 1. Plaintiff is a former college football player. *Id.* ¶ 3. From 2003 to 2005, he played quarterback for Arizona State University. *Id.* ¶¶ 43-45. In 2006, he transferred to the University of Nebraska, but sat out the season under NCAA rules regulating player transfers. *Id.* ¶ 46. Plaintiff then played quarterback for Nebraska in 2007, which marked the end of his collegiate football career. *See id.* ¶ 47. As a condition of his eligibility for collegiate athletics, he agreed to be bound by the NCAA's amateurism rules. *Id.* ¶¶ 13-14.

Plaintiff concedes that the games themselves, as sold by EA, do not include players' names or actual pictures. *Id.* ¶ 34 (EA "omits … the real-life player's name on the jersey of his electronic equivalent."); *id.* ¶ 2 (purported class is NCAA athletes whose "likenesses and distinct appearances," not pictures, allegedly were used). Nevertheless, Plaintiff has sued, on behalf of himself and a purported class of college athletes, alleging the misuse of their "names and likenesses." *Id.* ¶ 72. Keller asserts five causes of action against EA: (1) violation of his

statutory rights of publicity under California Civil Code section 3344; (2) violation of his California common law rights of publicity; (3) civil conspiracy; (4) violation of California Business and Professions Code section 17200; and (5) unjust enrichment. EA now moves to dismiss all of the causes of action asserted against it.

III. ARGUMENT

A. The Issues Presented in this Motion Should be Decided at the Pleading Stage.

1. In Deciding A Rule 12(b)(6) Motion Involving an Expressive Work, the Court May Rely Upon Its Own Examination of the Work.

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the plaintiff's claims. Dismissal is warranted if no relief could be granted under any set of facts that could be proved consistent with the allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007). A plaintiff must do more than merely raise the possibility that some set of facts might support recovery; he must set forth factual allegations that "raise a right to relief above the speculative level." *Id.* at 555. The Supreme Court recently affirmed these requirements, explaining the two principles underlying *Twombly*. "First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009).

When ruling on a motion to dismiss, a court may consider not only the plaintiff's allegations, but also material subject to judicial notice. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). A court may consider "document[s] the authenticity of which [are] not contested, and upon which plaintiff's complaint necessarily relies[,]" even if those materials are not attached to the complaint. *Parrino v. FHP Inc.*, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other grounds*, *Abrego Abrego v. The Dow Chem. Co.*, 443 F.3d 676, 681 (9th Cir. 2006); *see also Barnett v. Evans*, No. C 06-0193 CW (PR), 2009 WL 799402, at *4 (N.D. Cal. Mar. 24, 2009).

Consistent with these principles, courts deciding Rule 12(b)(6) motions regularly have examined expressive works, even if not attached to the complaint, to determine whether they are

actionable. For instance, in *Capcom Co., Ltd. v. MKR Group, Inc.*, No. C 08-0904 RS, 2008 WL 4661479 (N.D. Cal. Oct. 20, 2008), the court reviewed the allegedly infringing video game in determining that the First Amendment barred plaintiff's Copyright and Lanham Act claims, and granted the video game developer's motion to dismiss. *Id.* at *13-14; *see also Thomas v. Walt Disney Co.*, No. C-07-4392 CW, 2008 WL 425647, at *6 (N.D. Cal. Feb. 14, 2008) (dismissing plaintiff's copyright claim with prejudice based upon an examination of the disputed movie); *Kent v. Universal Studios*, Case No. CV 08-2704 GAF (SHx) (C.D. Cal. Aug. 15. 2008) (granting Rule 12(b)(6) motion on First Amendment grounds after reviewing defendant's film) (attached at Lauridsen Decl., Exh. A); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 973 (C.D. Cal. 2007) (granting Rule 12(b)(6) motion after reviewing defendant's television program to dismiss plaintiff's misappropriation claim); *cf. Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 872 (1979) (demurrer properly sustained based on the First Amendment).

Here, Plaintiff's claims all arise from the alleged use of his and other college players' "likeness" in EA's *NCAA Football* and *NCAA Basketball / NCAA March Madness* games. *See, e.g.*, Compl. ¶¶ 1, 11-12. Thus, under *Parrino* and other authority, the Court can and should consider the contents of the games in deciding this motion. *See* RJN ¶¶ 1-3.

By doing so, the Court may resolve this lawsuit at the pleading stage, which is especially appropriate because Plaintiff's claims target an expressive work. The California Supreme Court explained this point simply: "because unnecessarily protracted litigation would have a chilling effect upon the exercise of First Amendment rights, speedy resolution of cases involving free speech is desirable." *Winter*, 30 Cal. 4th at 891. To that end, the California Supreme Court noted that misappropriation and related claims "can often [be] resolve[d] … as a matter of law simply by reviewing the [defendant's] work in question…." *Id.* Critically, the Court instructed that such claims should be decided at the pleading stage where the works are properly before the court. *Id.* This is precisely the case here.

2. Only Games Released Within the Past 4 Years Are At Issue.

The Complaint does not identify which annual editions *NCAA Football* and *NCAA*

Basketball / NCAA March Madness allegedly misappropriated Plaintiff's likeness. Nonetheless, under the single publication rule, Plaintiff cannot state a claim arising from any edition of the games released before May 5, 2005, four years before he filed this action.

Under the single-publication rule codified in Civil Code Section 3425.3, any tort cause of action arising from a mass publication accrues on the date that the work is published, regardless of when the plaintiff first discovered the allegedly wrongful conduct. *See Shively v. Bozanich*, 31 Cal. 4th 1230, 1242-43 (2003); *Hebrew Academy of San Francisco v. Goldman*, 42 Cal. 4th 883, 887 (2007). The rule applies to statutory and common law misappropriation claims and ancillary state law claims. *See, e.g., Cusano v. Klein*, 264 F.3d 936, 950 (9th Cir. 2001); *Yeager v. Bowlin*, Case No. 2:08-cv-00102 WBS JFM, 2008 WL 3289481, at *4-5 (E.D. Cal. Aug. 6, 2008); *Long v. Walt Disney Co.*, 116 Cal. App. 4th 868, 873, 874 (2004)

Here, Plaintiff acknowledges that his claims arise from the mass media publication of each game. Specifically, Plaintiff alleges that EA publishes the *NCAA Football* and *NCAA Basketball / NCAA March Madness* franchises at issue. Compl. ¶ 11. Accordingly, Plaintiff's claims arising from each game edition accrued on that edition's release date. Because the longest statute of limitations applicable to Plaintiff's California claims is four years, *see* Cal. Bus. & Prof. Code § 17208, the only versions of the games at issue are those released after May 5, 2005, four years before he filed this action. Those games are *NCAA Football 06*, *NCAA Football 07*, *NCAA Football 08*, *NCAA Football 09*; and *NCAA March Madness 06*, *NCAA March Madness 07*, *NCAA March Madness 08* and *NCAA Basketball 09*. *See* RJN ¶ 4. In connection with EA's accompanying Request for Judicial Notice, EA has provided the Court with a copy of each version of the games at issue for play on the PlayStation 2 console, a PlayStation 2 game console, and controllers.

B. <u>The First Amendment and the California Constitution Bar All Plaintiff's Claims.</u>

Even assuming for purposes of this motion that a virtual player in *NCAA Football* or *NCAA Basketball / NCAA March Madness* embodies some protectable attribute of Plaintiff, his claims are barred, in their entirety, by the First Amendment and the California Constitution.

It is settled that video games are constitutionally protected works under the First

Amendment and California Constitution, article 1, section 2. *See, e.g., Video Software Dealers Ass'n v. Schwarzenegger*, 556 F. 3d 950, 958 (9th Cir. 2009) ("video games are a form of expression protected by the First Amendment"); *Kirby v. Sega of America, Inc.*, 144 Cal. App. 4th 47, 58 (2006) ("[v]ideo games are expressive works entitled to as much First Amendment protection as the most profound literature"); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) ("[i]f the first amendment is versatile enough to 'shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,'" there is "no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to a similar protection") (citations omitted).

The First Amendment's protection is not limited to select games with complex story lines, scripts, and dialogue. *Romantics v. Activision Publ'g, Inc.*, 574 F. Supp. 2d 758, 765 (E.D. Mich. 2008). Instead, the critical issue is whether the games have independent creative elements. *Id.* In *Romantics*, for instance, the court considered whether *Guitar Hero*—which allows players to pretend they are in a rock band—was entitled to First Amendment protection. *Id* at 766. The Court easily concluded that the game was an expressive work because it "allow[ed] players to customize their game play experience, contain[ed] large amounts of original artwork, and require[d] complex synchronization so that the audio and visual elements of the [g]ame line up with a player's manipulation of the controller." *Id.*; *see also E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc.*, 444 F. Supp. 2d 1012, 1039 (C.D. Cal. 2006), *aff'd* 547 F.3d 1095 (9th Cir. 2008) (holding that video game that "features three virtual cities, each of which contains hundreds of interactive locations created by animated graphics[,] incorporates a narrative, and offers an array of musical soundtracks . . . clearly qualifies as an 'artistic work' entitled to First Amendment protection"). *See also Daly v. Viacom, Inc.*, 238 F. Supp. 2d 1118, 1123 (N.D.Cal. 2003) (granting Rule 12(b)(6) motion on misappropriation claims because television program that allegedly used plaintiff's photograph and likeness was expressive work protected by First Amendment).

Under two separate and independent lines of authority, Plaintiff's claims are barred by

the First Amendment and the California Constitution.

1. The First Amendment and California Constitution Defeat Plaintiff's Misappropriation Claims Because Any Use is Transformative.

The California Supreme Court has cautioned that "[t]he right of publicity has a potential for frustrating" constitutionally protected expression. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 397 (2001) (internal quotations omitted). To protect expressive works, the Court "has subjected the 'right of publicity' under California law to a narrowing interpretation which accords with First Amendment values." *Cher v. Forum Int'l*, 692 F.2d 634, 638 (9th Cir. 1982). In *Guglielmi,* Justice Bird emphasized that these protections apply to *all* expressive works, including "entertainment," "works of fiction," "distracting tales for amusement," and "motion picture[s]." 25 Cal. 3d at 867-868 (Bird, J. concurring) (affirming dismissal of right of publicity claim that challenged inclusion of a person's name and likeness in a motion picture).

Of particular note here, the California Supreme Court has made clear that the "creative appropriation" of the images of athletes and other celebrities is an important avenue of creative expression:

> Entertainment and sports celebrities are the leading players in our Public Drama. We tell tales, both tall and cautionary, about them. We monitor their comings and goings, their missteps and heartbreaks. We copy their mannerisms, their styles, their modes of conversation and of consumption. . . . Their images are thus important expressive and communicative resources: the peculiar, yet familiar idiom in which we conduct a fair portion of our cultural business and everyday conversation.

Comedy III, 25 Cal. 4th at 397 (citations omitted).

With this in mind, the California Supreme Court repeatedly has held that as long as an expressive work is "transformative," the protection of free speech under the U.S. and California Constitutions "outweighs whatever interest the state may have in enforcing the right of publicity." *Comedy III*, 25 Cal. 4th 405. In determining whether a work is "transformative," the inquiry "is whether the celebrity likeness is one of the 'raw materials' from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question." *Id.* at 406; *accord Winter*, 30 Cal. 4th at 888. "[I]n other words," a court must evaluate whether the *work* "containing the celebrity's image is so

transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." *Id.*

Critically, the focus is *not* whether the plaintiff's likeness within the work has been transformed physically, but whether the work *as a whole* is transformative—*i.e.*, whether it "contain[s] significant creative elements that transform [it] into something more than mere celebrity likenesses." *Winter*, 30 Cal. 4th at 881. To underscore the breadth of this protection, the California Supreme Court in *Winter* pointed out that transformative works "can take many forms, from factual reporting to fictionalized portrayal, from heavyhanded lampooning to subtle social criticism." *Id.* Turning to the defendants' comic books, which featured supporting characters who were "less than subtle evocations" of the plaintiffs, the *Winter* Court declared that "[a]pplication of the test to this case is not difficult." *Id.* at 890. Because the characters based on the plaintiffs were "merely part of the raw materials from which the comic books were synthesized" and were part of "***a larger story***, which is itself quite expressive," the Court held that First Amendment defeated the plaintiffs' misappropriation claims. *Id.* (emphasis added).

Three years later, a California Court of Appeal applied the "transformative" test to hold that a video game was protected expression, barring the plaintiff's misappropriation claim. *Kirby*, 144 Cal. App. 4th at 50. There, a singer claimed that the defendant misappropriated her likeness to create a character in a video game, and asserted claims for deprivation of statutory and common law rights of publicity, violation of the Lanham Act, unfair competition, interference with prospective business advantage, and unjust enrichment. *Id* at 53. While the court accepted that the character's facial features, clothing, and hair style were reminiscent of the plaintiff, the court emphasized that she was only one element of a complex video game. *Id.* at 56. Because these elements of the plaintiff's persona were only a part of the raw material from which the game was synthesized, and were not the game's "very sum and substance," the court had no difficulty concluding that the defendant's use of the plaintiff's persona was transformative, and thus protected by the First Amendment "and the even greater speech protections afforded by the California Constitution." *Id.* at 57. All of the plaintiff's claims, therefore, failed as a matter of law. *Id.* at 61.

The same is true here. EA's *NCAA Football* and *NCAA Basketball / NCAA March Madness* games have all the elements—and more—that the courts in *Winter, Kirby, E.S.S.*, and *Romantics* found to be expressive and transformative. As a review of the games demonstrates, these works are extraordinarily complex feats of computer engineering combined with artistic expression, comprised of originally designed virtual locations, players, coaches, fans and other game elements. *See* RJN ¶¶ 1-3. The games feature original graphics, videos, sound, music and game scenarios, all keyed to the players' manipulation of the game controls and other input. *Id.* These elements are synchronized to deliver television-quality images and realistic sounds, such as the crunch of football pads, the swish of basketball nets, licensed fight songs for many of the college teams, and play-by-play commentary describing the action. *Id.* Players can match more than a hundred teams against each other, control team strategy decisions and individual athlete's movements in real time, and tinker with such subtle details as the weather and crowd noise. *Id.* Game players can take control of a team as it exists in EA's games or customize it based on their own preferences, altering the characteristics of individual players. *Id.* The interactive environment extends beyond single games, allowing players to control teams for entire seasons or manage the college program over a series of years, including recruiting virtual players from high school and monitoring their academic performance off the field or court. *Id.* EA's games allow competition against opponents controlled by the game itself, a person connected to the same system, or a person connected over the Internet. *Id.* As the above game content and features clearly demonstrate, the creativity and complexity of *NCAA Football* and *NCAA Basketball / NCAA March Madness* far exceeds that of other works found to be transformative.

Moreover, the information about which Plaintiff complains represents only a small part of the many raw materials that make up the games. Characteristics such as height, weight, agility and strength are assigned to a virtual player, represented in the game by an original graphic created by EA. *Id.* As a review of the games demonstrates, the player's characteristics are displayed visually on certain games screens, but also used by the game as parameters for that virtual player's performance. *Id.* The player is assigned to a team, clothed in a jersey and given a number—game elements Plaintiff admits are all properly licensed from the NCAA and CLC.

Compl. ¶ 11. The virtual player can be used in a single game simulation or in the more robust "Dynasty" and "Campus Legend" game modes. RJN ¶¶ 1-3. In the latter two game modes, the virtual player's characteristics evolve over multiple games and seasons simulated by EA's advanced programming. *Id.* Virtual players grow stronger, pass more accurately, rebound better, or improve their GPAs based upon choices made by the game player. *Id.*

Consequently, like the comic books in *Winter* and the video game in *Kirby*, *NCAA Football* and *NCAA Basketball / NCAA March Madness* are expressive, transformative works protected by the First Amendment and California Constitution. Therefore, Plaintiff's misappropriation claims fail as a matter of law.

2. The First Amendment and the California Constitution Bar Plaintiff's Claims Because of the Public's Strong Interest in Information About Sports and Athletes.

Separate from the "transformative" test, courts repeatedly have held that the public's interest in information about sports and athletes affords full First Amendment protection to a work that includes information about athletes—including their names, statistics and biographical information (exactly the information Plaintiff complains about here)—and bars misappropriation claims based on such use. Under this second line of authority that has developed independently of the "transformative" test, Plaintiff's claims are barred by the First Amendment and the California Constitution.[3]

In *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400 (2001), the defendant Major League Baseball used a wide array of material in printed programs, videos and its website without permission from the plaintiff baseball players, including "names of players included on All-Star and World Series rosters; descriptions of memorable performances from former games … [and] photographs and video clips taken of plaintiffs when they were playing the game themselves." *Id.* at 410. In addressing the plaintiffs' common law misappropriation claim, the

[3] This line of authority complements, but is independent of, the "public affairs" exemption from statutory right-of-publicity claim discussed below in Section III.D. Cal. Civ. Code § 3344(d). The "public affairs" exemption applies only to statutory claims, whereas the First Amendment defense applies to both statutory and common law publicity rights claims. *See, e.g.*, *Gionfriddo*, 94 Cal. App. 4th at 409.

court held that "[t]he recitation and discussion of factual data concerning the athletic performance of these plaintiffs command a substantial public interest, and, therefore, is a form of expression due substantial constitutional protection," *id.* at 411, and concluded that "the public interest favoring the free dissemination of information regarding baseball's history far outweighs any proprietary interests at stake," *id.* at 415. The court held that the plaintiffs' claims for violation of their common-law and statutory rights of publicity failed as a matter of law. *Id.*

In *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007), plaintiff C.B.C. offered "fantasy" online baseball games incorporating the actual names, nicknames, likenesses, signatures, pictures, playing records, and biographical data of major league baseball players. *Id.* at 823. C.B.C. initially had licensed this information from the Major League Baseball Players' Association. But when the Players' Association declined to renew the license, C.B.C. sought a judicial declaration of its right to use the players' information without a license, arguing that it had a First Amendment right to use the players' information without a license. *Id.* at 821. The Eighth Circuit agreed with plaintiff, affirming that the First Amendment protected the plaintiff's right to use athletes' names, statistics and biographical information in an online game. As the court observed, "the information used in C.B.C.'s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone." *Id.* at 823. Noting that "fantasy baseball games depend on the inclusion of all players and thus cannot create a false impression that some particular player with 'star power' is endorsing [the plaintiff's] products," the court held that the First Amendment "trump[ed]" the players' right of publicity. *Id.* at 822-824. *See also CBS Interactive, Inc. v. National Football League Players Ass'n, Inc.*, 2009 WL 1151982, at *19 (D. Minn. April 28, 2009) ("[L]ike in *C.B.C. Distribution*, the package of information used here [names, player profiles, up-to-date statistics, injury reports, participant blogs, pictures, images,

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and biographical information] comes within the ambit of the First Amendment").[4]

And in *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790 (1995), the court held that the First Amendment protected the defendant's use of football player Joe Montana's likeness on posters. "When Joe Montana led his team to four Super Bowl championships in a single decade, it was clearly a newsworthy event. Posters portraying the 49ers' victories are … 'a form of public interest presentation to which protection must be extended.'" *Id.* at 795 (citations omitted). The public has an abiding interest in professional football, so Montana's statutory and common law claims for misappropriation of his name and likeness were barred by the First Amendment. *See id.* at 796.

Taking Plaintiff's allegations as true, it follows that EA's alleged inclusion in its games of players' likenesses, statistics and biographical data enjoys the same free-speech protections of the First Amendment and California Constitution and bars Plaintiff's claims.[5] Plaintiff acknowledges the vast popularity of NCAA athletics by highlighting their successes and interest, *see, e.g.*, Compl. ¶¶ 5, 11, and confirms that college football and basketball are "closely followed by a large segment of the public." *C.B.S. Interactive*, 2009 WL 1151982, at *21. This factual, public-domain information about college athletes commands a substantial public interest, just as such information about profession athletes does. *See C.B.C.*, 505 F.3d at 823-24; *Gionfriddo*, 94

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[4] Significantly, CBS currently offers for college football the same online fantasy sports game that was found to be protected by the First Amendment in the professional context, including all the same types of statistics, biographical information, and individual college players' names. *See* RJN ¶ 6.

[5] While the Complaint acknowledges that the games do not include the names of players, it alleges that consumers have the ability to add to the games (post-purchase) the names from college team rosters which consumers may download from unaffiliated third-party websites. *See* Compl. ¶¶ 1, 35 – 39. To the extent that these allegations seek to impose liability on EA based on consumer's uses of roster names obtained from third parties, they fail for at least three reasons. First, EA did not engage in the alleged misappropriation, as the Complaint concedes. *See* Cal. Civil Code § 3344(a) (requiring the *defendant's use*). Second, the theory would be barred by the First Amendment, *see* Section III.B.1 above. Third, to the extent they seek to impose liability for internet-based conduct, such as consumers' use of EA Locker, they are barred by the Communications Decency Act of 1996 ("CDA"), which provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). This immunity extends to publicity rights claims. *See e.g. Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102, 1119 n.5 (9th Cir. 2007); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1121-23 (9th Cir. 2003).

Cal. App. 4th at 411; *Montana*, 34 Cal. App. 4th at 794-96.

If a poster of Joe Montana, a program from a baseball game, and a "fantasy sports" game that includes nothing more than players' names, photos, biographical information and statistics are all protected by the First Amendment against publicity rights claims, then so too must *NCAA Football* and *NCAA Basketball / NCAA March Madness*, which include a diverse array of additional creative and expressive features that don't exist in these other works.

3. Meritorious Misappropriation Claims Target Advertisements.

In contrast to the allegations here, successful misappropriation claims generally arise from the use of the plaintiff's name or likeness in advertising or merchandising of non-transformative works.[6] The line of authority restricting the use of a celebrity's likeness in commercial advertising "concerns only the market which exists in our society for the exploitation of celebrity to sell products, and ... attempt[s] to take a free ride on a celebrity's celebrity value." *White*, 971 F.2d at 1401 n.3. This is not the case here. *NCAA Football* and *NCAA Basketball / NCAA March Madness* are not advertisements or commercial speech—*i.e.* "speech that merely proposes a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Counsel, Inc.*, 425 U.S. 748, 762 (1976). This reasoning is consistent with a test used in some other jurisdictions, known as the "relatedness" test, which affords First Amendment protection to the use of a person's name or likeness as long as the use is "related" to the content of the work and is not "simply a disguised commercial advertisement for the sale of goods or services." *Romantics*, 574 F. Supp. 2d at 766; *see also Rogers v. Grimaldi*, 875 F.2d 994, 1004 (2d Cir. 1989); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47,

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[6] *See, e.g., Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 691 (9th Cir. 1998) (use of pitcher's image in beer advertisement); *Wendt v. Host Int'l, Inc.*, 125 F.3d 806, 809 (9th Cir. 1997) (use of animatronic figures of television characters in airport bars); *Abdul-Jabbar v. Gen. Motors Corp.*, 85 F.3d 407, 409 (9th Cir. 1996) (use of basketball star's former name in television car commercial); *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992) (use of game-show hostess's identity in advertisements for electronic products); *Midler v. Ford Motor Co.*, 849 F.2d 460, 461-62 (9th Cir. 1988) (use of sound-alike of famous singer in car commercial featuring singer's hit song); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 822 (9th Cir. 1974) (use of famous race car driver's distinctive car in cigarette commercial).

comment c.[7] Here, Plaintiff rightly does not claim that EA's alleged use of his likeness is "wholly unrelated" to the content of the games or a disguised commercial advertisement or endorsement.

C. All of Plaintiff's Claims Fail Because He Has Not Alleged A Recoverable Injury.

All of Plaintiff's claims also fail because he does not allege the necessary element of injury. The standing requirements of Article III and the elements of each of Plaintiff's claims require him to allege facts showing that he was injured.[8] Conclusory allegations of injury are insufficient to avoid a motion to dismiss. *See, e.g., Barnett*, 2009 WL 799402, at *10-11 (dismissing complaint for failure to adequately allege injury). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949. The same principle applies to claims under Section 17200 and for unjust enrichment, although they are not damages claims. Even before Proposition 64 added the requirement of alleging injury in fact and loss of money or property to state a claim under Section 17200, a plaintiff was required to allege that he had "given up something which he or she was entitled to keep" in order to claim monetary recovery. *Day v. AT&T Corp.*, 63 Cal. App. 4th 325, 340 (1998). Likewise, even if an independent cause of action for unjust enrichment existed under California law—as shown below, it does not—a plaintiff cannot avoid the basic requirements of pleading and proving actual injury by styling his claim as one for unjust enrichment. *See Peterson*, 164 Cal. App. 4th at 1593-95.

Here, Plaintiff's only allegations of injury are entirely conclusory. The sum total of Plaintiff's injury allegations are: "Plaintiff and class members have been injured," Compl. ¶¶ 74, 77, "Plaintiff and class members have been damaged as described above," *id.* ¶ 81, "Electronic Arts' conduct has further caused and is causing damage and irreparable injury to Plaintiff and

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[7] For the purposes of this motion, EA will assume that California law applies.

[8] *See, e.g., MAI Systems Corp. v. UIPS*, 856 F. Supp. 538, 540-42 (N.D. Cal. 1994) (plaintiff must allege injury to have standing); *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004) (injury is an element of common-law and statutory right-of-publicity claims); *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511 (1994) (same for civil conspiracy); Cal. Bus. & Prof. Code § 17204 (same for § 17200 claim); *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593-95 (2008) (same for unjust enrichment).

class members," *id.* ¶ 84, and "[t]o the detriment of Plaintiff and class members, Defendants Electronic Arts and CLC have been and continue to be unjustly enriched as a result of the unlawful and/or wrongful conduct alleged within," *id.* ¶ 90. Such a "formulaic recitation" of the necessary element of injury is insufficient to state a claim. *Twombly*, 550 U.S. at 555.

Even if the Court were to extrapolate from Plaintiff's other allegations, Plaintiff has not "nudged [his] claims [of injury] across the line from conceivable to plausible," *id.* at 570, because EA was—and is—legally barred from providing college athletes the compensation Plaintiff demands. California's Miller-Ayala Act makes it a misdemeanor for anyone, other than attorneys and other exempted persons not relevant here, to provide "remuneration for any value or utility that" a student athlete "may have because of publicity, reputation, fame, or following obtained because of athletic ability or performance." Cal. Bus & Prof Code §§ 18895.2, 18897.6 & 18897.93. Courts will not recognize damage claims premised on allegations that parties would or should have entered into an unlawful contract. *See, e.g.*, *Page v. Bakersfield Uniform & Towel Supply Co.*, 239 Cal. App. 2d 762, 773 (1966) ("It is a wrongful and improper practice to seek damages dependent upon a violation of the law."); *Picton v. Anderson Union High Sch. Dist.*, 50 Cal. App. 4th 726, 730 (1996) (illegal contracts cannot be enforced). In other words, an opportunity to replead would not cure the defect, because California law bars the conduct Plaintiff now claims EA should have undertaken.

Because Plaintiff offers nothing beyond bare legal conclusions to show that he was injured, the Court should dismiss all of Plaintiff's claims against EA with prejudice.

D. Plaintiff's California Statutory Misappropriation Claim is Barred by the Statute's "Public Affairs" Exemption.

Plaintiff's second cause of action for alleged violation of his publicity rights under California Civil Code Section 3344 also fails because the statute expressly exempts from liability the "use of a name . . . or likeness in connection with any . . . public affairs, or sports broadcast or account." Cal. Civ. Code § 3344(d). This exemption affords works *even broader protection* against statutory misappropriation than the First Amendment does. *New Kids on the Block v. News America Pub., Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992) ("the section 3344(d) defense is

not coextensive with the First Amendment. Rather, it is designed to avoid First Amendment questions in the area of misappropriation by providing extra breathing space for the use of a person's name in connection with matters of public interest.").

EA's alleged inclusion of Plaintiff's likeness meets the statutory definition of "in connection with . . . public affairs." Cal. Civil Code § 3344(d). Courts repeatedly have held that expressive works related to a variety of sports are "in connection with … public affairs," and in circumstances less compelling than here. In *Dora v. Frontline Video Inc.*, 15 Cal. App. 4th 536 (1993), for example, the court held that the "public affairs" exception applied to surfing, which "has created a life style that influences speech, behavior, dress, and entertainment, among other things. A phenomenon of such scope has an economic impact, because it affects purchases, travel, and the housing market. Surfing has also had a significant influence on the popular culture, and in that way touches many people." *Id.* at 546. In *Montana*, the court held that the use of Joe Montana's likeness also fell within the Section 3344(d) "public affairs" exception, finding that "the same public interest considerations applicable to surfing apply with equal force to professional football." *Montana*, 34 Cal. App. 4th at 796. And the court in *Gionfiddo* reached the same conclusion with respect to baseball, noting that "[b]aseball, not surfing, is, after all, 'the national pastime.'" *Gionfriddo*, 94 Cal. App. 4th at 416.

College football and basketball are of equal interest to the public as professional football and baseball—let alone surfing. Plaintiff concedes as much, alleging that the NCAA "generates hundreds of millions in royalties, broadcast rights and other licensing fees each year." Compl. ¶ 5. Likewise, Plaintiff alleges that "[c]onsumers demand that these [video game] matches simulate actual college matches in the most realistic manner possible," *id.* ¶ 11, which simply underscores the intensity of public interest in college sports.

As *Dora*, *Montana* and *Gionfriddo* recognize, "public affairs" includes much more than just traditional news broadcasts, and extends to works—whether informative, entertaining, or both—that relate to "popular culture" and to "real-life occurrences." *Dora*, 15 Cal. App. 4th at 545-46. If a film about surfing, a poster of Joe Montana, and a program from a baseball game are exempt under Section 3344(d), then so, too, are *NCAA Football* and *NCAA Basketball* /

March Madness—games about college football and college basketball. Plaintiff's California statutory misappropriation claim fails for this independent reason.

E. Plaintiff's Civil Conspiracy Claim Fails Because There is No Underlying Tort.

Plaintiff lacks an underlying tort upon which to base his fourth cause of action for civil conspiracy. "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994).[9] Because each of Keller's first three causes of action for misappropriation are barred by the First Amendment and fail for numerous additional reasons,[10] his fourth cause of action for civil conspiracy has no underlying tort and, therefore, fails.[11]

Furthermore, "allegations of conspiracy must be supported by material facts, not merely conclusory statements." *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir. 1989) (citation omitted). Keller alleges no facts, at all, to support his conspiracy claim and nudge it pass the theoretical to the plausible. *Twombly*, 550 U.S. at 570. Instead, the Complaint does that which the Supreme Court has admonished against—merely reciting the legal elements of the claim and offering no facts to support it. *See* Compl. ¶ 79 (on "information and belief," "Defendants, and each of them, have conspired to use class members' likenesses without permission…."). For this independent reason, his conspiracy claim fail to satisfy basic pleading

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[9] To the extent that Indiana law applies to the conspiracy claim, Indiana law is in accord with California law. Under Indiana law "there is no cause of action for conspiracy as such. The cause of action is for damage resulting from a conspiracy." *Indianapolis Horse Patrol, Inc. v. Ward*, 247 Ind. 519, 522 (1966). Plaintiff must show that there was a conspiracy to achieve some unlawful purpose or a lawful purpose through unlawful means. *Id.* "In other words, allegations of a civil conspiracy are just another way of asserting concerted action in the commission of a tort." *Boyle v. Anderson Fire Fighters Ass'n Local 1262, AFL-CIO*, 497 N.E. 2d 1073, 1079 (Ind. Ct. App. 1986).

[10] The first cause of action against the NCAA for deprivation of rights of publicity under Indiana law fails for the reasons stated in the NCAA's Motion to Dismiss.

[11] The remaining fifth through seventh causes of action cannot form the basis of Plaintiff's fourth cause of action for civil conspiracy. There is no civil conspiracy for a breach of contract. *Hanni v. Am. Airlines, Inc.*, 2008 WL 5000237, at *5 (N.D. Cal. Nov. 21, 2008). And the California unfair competition and purported unjust enrichment claims are not stand-alone torts, but, like the civil conspiracy claim, require a separate underlying tort.

requirements and should be dismissed. *See Iqbal*, 129 S.Ct. at 1949.

F. Plaintiff's Section 17200 Fails Because It Lacks a Predicate Violation and Seeks an Unavailable Remedy.

As with his civil conspiracy claim, Plaintiff lacks an underlying wrong on which his unfair competition claim may stand. Section 17200 "borrows violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." *Goldman v. Standard Ins. Co.*, 341 F.3d 1023, 1036 (9th Cir. 2003) (internal quotations and citations omitted). In this manner, an unfair competition claim "ride[s] the coattails" of the plaintiff's primary claims. *Kirby*, 144 Cal. App. 4th at 57 n.3. Here, there are no coattails to ride. Because Plaintiff's unfair competition is derivative of his misappropriation and civil conspiracy claims against EA, it fails for the same reasons they do.

Separately, Plaintiff's Section 17200 claim fails, because he improperly seeks to obtain monetary relief. As part of his Section 17200 claim, Plaintiff seeks disgorgement of EA's "profits obtained from the utilization of Plaintiff and class members names and likeness." Compl. ¶ 84. However, "nonrestitutionary disgorgement of profits is not an available remedy in an individual action under the UCL." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1152; *see also Alch v. Superior Court*, 122 Cal.App.4th 339, 408 (2004) (denying a UCL class action claim for non-restitutionary back-pay). Plaintiff alleges no facts—because he cannot—showing that disgorgement of EA's profits would be restitutionary, "restor[ing] the status quo by returning to plaintiffs funds in which he or she has an ownership interest." *Korea Supply Co.*, 29 Cal. 4th at 1149. To the contrary, plaintiff has no ownership interest in any of EA's funds and cannot point to a now-disrupted status quo in which he legally possessed the funds. Plaintiff does not allege that he has a vested interest in EA's profits, nor even an attenuated expectancy. *See id.* at 1149-50. Accordingly, if the Court finds that Plaintiff has stated a Section 17200 claim at all—which he has not—the only available relief is an injunction.

G. Plaintiff's Unjust Enrichment Claim Fails Because There is No Such Claim Under California Law and There Exists an Express Contract Covering the Same Subject.

Finally, Plaintiff's unjust enrichment claim fails as a matter of law for two additional reasons.

First, no claim for unjust enrichment exists under California law absent independent grounds for imposing an implied contract or constructive trust on the defendant. As one Court of Appeal recently held, under California law, "[t]here is no cause of action for unjust enrichment. Rather, unjust enrichment is a basis for obtaining restitution based on quasi-contract or imposition of a constructive trust." *McKell v. Washington Mut., Inc.*, 142 Cal. App. 4th 1457, 1490 (2006); *accord Roots Ready Made Garments v. Gap Inc.*, No. C 07-03363 CRB, 2008 WL 239254, at *8 (N.D. Cal. Jan. 28, 2008) (dismissing unjust enrichment claim with prejudice). Plaintiff has neither alleged that an implied contract exists between the parties nor that a constructive trust would be appropriate. Thus, Plaintiff fails to state a claim for unjust enrichment because California law does not recognize a claim based on bare allegations that Defendants have "unjustly benefited." *See id.*

Second, to the extent that a limited claim for unjust enrichment is recognized under California law, it is well established that such a claim does fail where there exists "a valid express contract covering the same subject matter." *Lance Camper Mfg. Corp. v. Republic Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996); *accord City of Oakland v. Comcast Corp.*, No. C 06-5380, 2007 WL 518868, *4-5 (N.D. Cal. Feb. 14, 2007). This rule operates to bar unjust enrichment claims regardless of whether or not the contract at issue is between the plaintiff and a defendant. *See, e.g., 4 Hour Wireless v. Smith*, 01 Civ 9133, 2002 U.S. Dist. LEXIS 22680, at *1-2 (S.D.N.Y. Nov. 22, 2002). Here, Plaintiff alleges that he and other players entered into contracts with defendant NCAA, which "impose specified duties on Defendant NCAA," including a purported duty not to permit EA "to utilize players' names and likenesses." Compl. ¶¶ 86-87. Because Plaintiff's contract with the NCAA, by Plaintiff's own allegations, covers the same subject matter as his unjust enrichment claim, that claim must fail as a matter of law. *See Lance Camper*, 44 Cal. App. 4th at 203. It should be dismissed with prejudice.

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IV. CONCLUSION

For all of the foregoing reasons, the Court should dismiss Plaintiff's complaint against EA in its entirety, with prejudice.

Dated: July 29, 2008

KEKER & VAN NEST LLP

By: */s/ Robert A. Van Nest*
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